

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KEVIN MCKEOWN,

Plaintiff,

08 CIV. 2391 (SAS)

-against-

**REPLY AFFIRMATION
IN SUPPORT OF
MOTION TO DISMISS**

THE STATE OF NEW YORK; THE OFFICE OF COURT
ADMINISTRATION OF THE UNIFIED COURT SYSTEM;
THE N.Y. STATE COMMISSION ON JUDICIAL CONDUCT;
THE N.Y.S. 1ST DEPT., DEPARTMENTAL DISCIPLINARY
COMMITTEE; THOMAS J. CAHILL, in his official and individual
capacity; SHERRY K. COHEN, in her official and individual capacity;
GARY L. CASELLA, in his official and individual capacity;
NANCY J. BARRY, in her official and individual capacity;
FRANCIS A. NICOLAI, in his official and individual capacity;
JOSEPH M. ACCETTA, in his official and individual capacity;
ROBERT M. DIBELLA, in his official and individual capacity;
ANTHONY A. SCARPINO, in his official and individual capacity;
ROBERT A. KORREN; JEFFREY A. MCNAMARA;
PATRICIA BAVE-PANEL; GIULINI & GIULINI, ESQS.;
CHARLES A. GIULINI, individually and as a partner of Giuliani
and Giuliani; CHRISTINE GIULINI, individually and as a partner
of Giuliani and Giuliani; CATHERINE M. MIKLITSCH;
MCQUADE & MCQUADE, ESQS, JOSEPH F. MCQUADE,
individually and as a partner of MCQUADE & MCQUADE;
MICHAEL D. McQUADE, individually and as partner of
McQuade & McQuade and JOHN and JANE DOES, 1-20,

Defendants.

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STATE OF NEW YORK and COUNTY OF NEW YORK) ss.:

JOSEPH F. McQUADE, an attorney duly admitted to practice before the County of the
State of New York and before the U.S. District Court, Southern District, under penalties of
perjury, affirms as follows:

1. I am a member of the firm of McQUADE & McQUADE and am one of the named

Defendants in the above entitled action.

2. I make this Reply Affirmation on behalf of Defendants MICHAEL D. McQUADE, JOSEPH F. McQUADE and my firm McQuade & McQuade and in support of my Motion to Dismiss Counts SIX and SEVEN of Plaintiff's Amended Complaint and in reply to Plaintiff's "Memorandum of Law in Opposition."

3. The Defendants McQuade also join in the State of New York's Motion To Dismiss Counts ONE through FIVE.

4. Plaintiff McKeown has submitted a Memorandum of Law in Opposition. He has not submitted a sworn Affidavit or other response made under oath. He has failed to offer any evidentiary proof in opposition to the Motions to Dismiss. Plaintiff's mere Declaration pursuant to statute does not qualify, I submit, as a "sworn to" response to this Motion to Dismiss.

PLAINTIFF'S AMENDED COMPLAINT MUST BE DISMISSED

5. Plaintiff in his Amended Complaint seeks only money damages against Defendants McQuades and in no instance seeks or requests equitable relief.

6. His claim for breach of fiduciary duty in COUNT SEVEN is time-barred. Plaintiff's COUNT SEVEN (paragraphs 121 to 123) is DEVOID of any fact or statement which provides the basis for equitable relief. Also, Plaintiff specifically asks for monetary damages against Defendants MICHAEL and JOSEPH McQUADE and the McQUADE & McQUADE firm.

7. The case law in New York State is clear. Plaintiff's cause of action for breach of fiduciary duty based on September, 2003 events should have been brought before September,

2006. The 3-year statutory time period has expired.

8. Plaintiff's COUNT SEVEN must be dismissed as a matter of law based on the applicable Statute of Limitations.

9. Defendants respectfully refer this Court to the cases cited in Defendants' McQuades' Memorandum of Law, Point I in support of our Motion to dismiss the Complaint.

**PLAINTIFF'S UNSUBSTANTIATED "FRAUD" COMMENTS IN A
MEMORANDUM OF LAW HAVE NO LEGAL WEIGHT**

10. Plaintiff's Amended Complaint (123 paragraphs in length) pleaded no fraud claim against Defendants McQuades. In Plaintiff's Memorandum of Law, dated July 14, 2008, Plaintiff states that Defendants committed various frauds and other torts against him. **PLAINTIFF offers no supporting document or facts to support his bare, conclusory remarks.**

12. Furthermore, Plaintiff misrepresents that "Defendants McQuade within the last year produced documents in court that provided more documentation of their breach of fiduciary duty and fraud." The court McKeown refers to is the Westchester County Surrogate's Court. Neither I nor my firm have produced in the last year documents in court - nor were we asked to do so.

13. This Court must ask: Where is the fraud claim that Plaintiff now belatedly refers to? It is not found in Plaintiff's Amended Complaint. Where are the facts which support a cause of action grounded in fraud in Plaintiff's Amended Complaint? There are none.

14. The retainer agreement entered into between my firm and the Estate of Margaret A. McKeown provides that the McQuade firm was to service, to protect and to serve the decedent's Estate's interests. When Co-Executrix, Mary Virga, decedent's sister, discovered

Plaintiff KEVIN McKEOWN's misappropriation of decedent's funds and destruction of decedent's records, the Westchester Surrogate was properly and lawfully informed and KEVIN McKEOWN was removed as Preliminary Executor.

15. The conclusory statements in Plaintiff's Memorandum of Law , all of which are totally unsupported, fly in the face of the Surrogate Court's rulings and are unfounded in law and in fact.

16. Plaintiff KEVIN McKEOWN'S wrongful and improper misconduct which damaged his mother's estate and his attempts to conceal his own misdeeds cannot provide the basis for a breach of contract cause of action.

17. As a matter of law, Plaintiff's COUNT SEVEN must be dismissed.

WHEREFORE, Defendants, JOSEPH McQUADE and MICHAEL McQUADE and the firm of McQUADE & McQUADE request that COUNTS SIX and SEVEN in Plaintiff's Amended Complaint be dismissed and for such other and further relief as the Court deems proper.

Pursuant to 28 USC § 1746, I declare under penalty of perjury the foregoing is true and accurate.

Dated: July 25, 2008
New York, N.Y.


JOSEPH MCQUADE